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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

* * *

NO. 71-962

* * *

WILLIAM DONALD KELLEY, ET AL,
Petitioners

v.

THE TEXAS STATE BOARD OF MEDICAL EXAMINERS
Respondent

* * *

On Writ of Certiorari to the Fort Worth Court of Civil Appeals (Second Supreme Judicial District) and the Texas Supreme Court

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant Attorney General
ALFRED WALKER
Executive Assistant
ROBERT C. FLOWERS
Assistant Attorney General
GUY C. FISHER
Assistant Attorney General
Attorneys for Respondent
Box 12548, Capitol Station
Austin, Texas 78711

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RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE SUPREME COURT OF THE UNITED STATES:

Now comes the Texas State Board of Medical Examiners, Respondent, and files its response to Petitioner's petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals at Fort Worth was delivered on May 7, 1971, and is reported at 467 S.W. 2d 539 (Tex.Civ.App., 1971). Application for writ of error to the Texas Supreme Court was refused without opinion with the notation of "no reversible error" on October 6, 1971, rehearing denied, November 3, 1971.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C., Section 1257 (2) and (3). The jurisdictional requisites would appear to be adequately set forth in the petition although Respondent disputes Petitioner's contentions that any rights guaranteed by the United States Constitution have been violated.

QUESTIONS PRESENTED

The questions presented by Petitioner may be condensed into one question:

Whether the guarantees of free speech and freedom of the press by the First and Fourteenth Amendments to the Constitution of the United States preclude the injunction against the continued distribution of the booklet entitled "One Answer to Cancer" which was found to present a clear and present danger to society and to constitute the unlawful practice of medicine.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the State Trial Court Injunction affirmed by the Fort Worth Court of Civil Appeals violates his First Amendment right of free speech and freedom of the press made applicable to the State by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth correctly states the nature and result of this suit. 467 S.W.2d 539-547 (Tex.Civ.App. 1971, error ref., n.r.e.)

ARGUMENT AND AUTHORITIES

A. BALANCING OF INTEREST IS THE TEST; THE ABSENCE OF PRIOR RESTRAINT; APPLICATION OF THE CLEAR AND PRESENT DANGER DOCTRINE.

The injunction against petitioner, William Donald Kelley, individually, and d/b/a the Kelley Research Foundation, Inc., a corporation, for practicing medicine without a license and against distribution of the booklet "One Answer to Cancer," authored by William Donald Kelley and sponsored by the Kelley Research Foundation, are based on extensive findings of fact and conclusions of law. These findings and conclusions are supported by the record. Distribution of the booklet was found to be an integral part of the illegal practice of medicine as well as the practice of medicine in and of itself. Further publication, sale and/or distribution of the booklet was enjoined as a necessary remedy to protect the public.

Petitioners present a tenacious argument about enjoining a publication and allege the evils of "prior restraint" and the necessity of meeting the test of "clear and present danger." However, this case involves much more than the mere publication of ideas, and in no way involves a prior restraint of the booklet "One Answer to Cancer." What is involved is the further publication, distribution or sale by Petitioners, of the booklet "One Answer to Cancer," found by the State courts to constitute the practice of medicine, and when considered in conjunction with the other activities of the Petitioner, found to be a tool by which Petitioners furthered their illegal practice of medicine.

Such illegal activities have never been protected as free speech.

Therefore, the guarantees of free speech and freedom of the press made by the First and Fourteenth Amendments to the Constitution of the United States in no way preclude the injunction against the continued distribution of the booklet entitled "One Answer to Cancer."

As pointed out by the Court of Civil Appeals of Texas in its opinion, the arguments and brief of Petitioners indicate their primary concern to pertain to the prohibition of the publication and distribution of the booklet "One Answer to Cancer," whereas the State's primary concern has been the whole course of illegal activities of Petitioners. The booklet "One Answer to Cancer" was found to be an integral part of the whole course of illegal activities of the petitioners.

As aptly expressed by the court in the case of *Government of the Virgin Islands v. Broadhurst*, 285 F. Supp. 831, 837 (D.C. V.I., 1968):

> "It is not easy to define the permissible limitations on the constitutional right or to derive from the decisions generally applicable standards. While it is settled that the constitutional rights of freedom of speech and of the press embrace the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment, it remains true that where the line is to be drawn in a particular case does not rest on generalities but rather on the concrete clash of particular interests and the community's relative evaluation, both of these interests and of how the one will be affected by a specific restriction and the other by its absence."

In *Jones v. City of Opelika*, 316 U.S. 584, 593 (1942), this court stated:

> "They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument. Conflicts in the exercise of rights arise, and the conflicting forces seek adjustments in the courts, as do these parties, claiming on the one side the freedom of religion, speech and the press, guaranteed by the Fourteenth Amendment, and on the other the right to employ the sovereign power explicitly reserved to the State by the Tenth Amendment to ensure orderly living, without which constitutional guarantees of civil liberties would be a mockery."

Thus, any attempt to restrict those liberties of free speech, religion, or free press must be justified by a clear public interest, treated not doubtfully or remotely, but by clear and present danger. *Thomas v. Collins*, 323 U.S. 516 (1945); *Schenck v. United States*, 249 U.S. 47 (1919). The "clear and present danger" doctrine is not a mechanical test applicable in every case touching First Amendment freedoms, without regard to the context of its application. *American Communications Association v. Douds*, 339 U.S. 382 (1950).

The Court in the *Douds* case pointed out that when the effect of a statute or ordinance upon the exercise of First Amendment freedom is relatively slight and the public interest to be protected is substantial, a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity. When particular conduct is regulated in the interest of public order and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular

circumstances presented. Legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct active conduct, are not presumptively bad because they interfere with, and in some of their manifestations, restrain the exercise of First Amendment rights. In essence, the problem is one of balancing the probable effects of the statute upon the free exercise of the right of speech and assembly against the legislative determination that certain evil conduct should be suppressed. See Annotations: The Supreme Court and The Right of Free Speech and Press, 93 L.Ed. 11551; 2 L.Ed. 2d 1706; 11 L.Ed. 2d 1116, 1120-1121.

Recognizing the fact that under the Federal Constitution the rights of freedom of speech and press are not unlimited, and that under a proper state of facts state courts are vested with the authority to enjoin and punish certain conduct, as well as speech, this court and other federal and state courts have held that the States are vested with the authority to enjoin picketing by a labor organization to protect the rights of the citizens, when such picketing in enmeshed with violence, or where it involves such conduct as the state is authorized to declare unlawful, or is a breach of laws necessary for the protection and welfare of people. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 787 (1941); *Borden Co. v. Local No. 132, etc.*; 152 S.W.2d 828 (Tex.Civ.App. 1968, error ref., n.r.e.); *Local Union No. 858 of Hotel Restaurant Employees International Alliance, et al., v. Jiannas, et al.*, 200 S.W.2d 763 (Ark.Sup. 1947); *Cain, Brogden & Cain v. Local Union No. 47, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 285 S.W.2d 942 (Tex.Sup. 1956); *Texas State*

Federation of Labor v. Brown & Root, Inc., 246 S.W.2d 938 (Tex.Civ.App. 1952, error ref., n.r.e.); *Inc. v. Wilson*, 166 A.2d 271 (Pa.Sup. 1960); *Starr v. Cooks, Waiters, Waitresses, and Helpers Union*, 70 N.W.2d 873 (Minn.Sup. 1955); *Wright v. City of Montgomery, Alabama*, 406 F.2d 867 (5th Cir. 1969).

Justice Frankfurter, in the *Meadowmoor* case, quoted with approval from the opinion in *Carlson v. State of California*, 310 U.S. 106, 113 (1940), "the power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives and the property of its residents cannot be doubted." In accord with this reasoning are the cases of *Smith v. Womack*, 271 S.W. 209 (Tex.Crim. 1925); *Ex Parte Warfield*, 50 S.W. 933 (Tex.Crim. 1899). In *Pashko v. Pashko*, 101 N.E.2d 804 (Ohio Ct. Common Pleas, 1951), the court held that the restraining of a defendant in a suit for the partial alienation of a wife's affection, and from conversing with or writing to her in any way, or associating with her, was not inconsistent with freedom of speech, or the press, or of locomotion. See *Governmen tof Virgin Islands v. Broadhurst, supra*, wherein the Court upheld the legislative decision that the rehabilitation goals of juvenile law are so important as to override the right of the press to identify juvenile defendants. In *In Re Gault*, 387 U.S. 1 (1966), this court gave implicit approval to such restrictions on First Amendment rights.

In other instances, courts have held that a person may be punished for his religious views when, through external conduct, such views are put into practice which are fraught with clear and present danger to the safety, morals, health and general welfare of the

community and in violation of laws enacted for their protection. *Jones v. City of Opelika, supra, Baxley v. U.S.*, 134 F.2d 937 (4th Cir. 1943); *United States v. Kuch*, 288 F.Supp. 439 (D.C.D.C. 1968); *People v. Estep*, 104 N.E.2d 562 (Ill.App.Ct., 1957); *Hopkins v. State*, 69A 2d 465 (Md.Ct.App. 1949). Otherwise, as stated by the Supreme Court in *Reynolds v. United States*, 98 U.S. 145, 167 (1878), "to permit this would be to make the professed doctrines of religious beliefs superior to the laws of the land and in effect to permit every citizen to become a law unto himself."

Closely akin to these cases are those cases wherein symbolic speech has been restricted by requiring that if one engages in conduct aimed to be symbolic speech, he must limit himself to lawful conduct. One is not entitled to commit criminal acts with impunity even in order to communicate ideas. *United States v. O'Brien*, 391 U.S. 367 (1968); *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969); *People v. Street*, 20 N.Y. 2d 231 (N.Y.App. 1967). Neither is obscenity, libelous utterances, or insulting or fighting words within the area of constitutionally protected speech or press and therefore may be prevented or punished when spoken or published. *Roth v. United States*, 354 U.S. 476 (1957); *Fine Arts Guild, Inc. v. City of Seattle*, 445 P.2d 602 (Wash. Supp. 1968); *Beauharnais v. People*, 343 U.S. 250 (1952); *City of Portland v. Derrington*, 451 P.2d 111 (Ore.Supp. 1968).

Clearly, the police power of the State extends to the regulating of trades and callings concerning public health, and practitioners of medicine are properly subject to police regulation. The details of regulation are primarily with the legislature, and are not to be inter-

fered with by the Federal Courts so long as fundamental constitutional rights are not violated. *Dent v. West Virginia,* 129 U.S. 114 (1899); *Watson v. State of Maryland,* 218 U.S. 173 (1910). The legislature of any state may make reasonable classifications of practitioners. *Pollemus v. American Medical Association,* 145 F.2d 357 (10th Cir. 1944); *People v. Galway,* 260 P.2d 212 (Calif.App. 1953); *Lee Optical of Oklahoma v. Williamson,* 120 F.Supp 128 (W.D. Okla. 1954). *People v. Handzik,* 102 N.E.2d 340 (Ill.Sup. 1951). It is also true that the legislature may make reasonable classifications of practitioners in the medical field and that such classifications are not inhibited by the provisions of the Fourteenth Amendment to the Federal Constitution. *Ex Parte Halstead,* 182 S.W.2d 479 (Tex.Civ.App. 1944).

Whether the guarantees of free speech and freedom of the press precludes the injunction against the continued distribution of the booklet entitled "One Answer to Cancer," which was found to present a clear and present danger of a substantial evil which the legislature of Texas has a right to prevent, and which was found to constitute the unlawful practice of medicine, must depend upon a judicial determination of the scope of the First and Fourteenth Amendments as applied to the circumstances of this case.

B. THE ILLEGAL PRACTICE OF MEDICINE AND THE PRESENCE OF A DOCTOR PATIENT RELATIONSHIP.

In construing the Texas Medical Practice Act, Article 4510, Vernon's Civil Statutes, and in determining what constitutes the practice of medicine thereunder, it has been the long and consistent holding of the Texas

Courts, as stated in *Ex Parte Halstead*, 182 S.W.2d 479, 483:

> "that one who publicly professes to treat diseases or disorders, and to effect cures thereof, or one who in fact treats diseases or disorders as a profession or a vocation is practicing medicine regardless of the system or method employed, the name by which the system is known or whether or not drugs or surgery are used. The practice of medicine as contemplated is defined by laws not restricted to the treatment of diseases or disorders of the human body by the use of drugs or surgery." 182 S.W.2d 479, 483.

The evidence in this case undisputedly shows the Petitioner, Dr. William Kelley, to have practiced medicine, as defined above, and that his activities were not restricted solely to the practice of dentistry as defined by Articles 4543, et seq. (Appended is a copy of the Statement of Facts, a part of the official record in this cause, to be made a part of this brief in opposition to Petitioners writ of certiorari).

The fact that the Petitioner, Dr. William Kelley, was a duly licensed dentist, did not authorize him to practice medicine. Admittedly, a dentist who publicly represents himself as a dentist is excepted from the law requiring a certificate for the practice of medicine, but when he represents himself as a physician by publicly professing to diagnose, treat and effect cures, or is in fact diagnosing, treating and effecting cures for pay, he is not within the exception provided by law, as it applies to dentists. Nor does the booklet "One Answer to Cancer" simply attempt to put forth Dr. Kelley's ideas on the subject of cancer. Its contents and textual material and the statements made therein

by Petitioner in afid of itself constitutes a "public profession" of the practice of medicine by the Petitioner. It is the combined effect of the entire booklet, and not just the front page, which led the trial court to conclude that said booklet represented a "public profession" of the practice of medicine. (Petitioners Appendix C; Statement of Facts, p. 22, 39, 59, 162, 175).

The Petitioner argues that the booklet "One Answer to Cancer," when applying the provisions of the Medical Practice Act, is not a publication which constitutes the practice of medicine in any form.

Respondent would submit that the trial court and Court of Appeals properly found that the publication "One Answer to Cancer" is a diagnosis, treatment, and offer of treatment, and therefore constitutes the practice of medicine. (Petitioners Appendix C, Statement of Facts, p. 21, 39, 59, 162, 175). The conclusion that the publication constitutes an advertising scheme wherein Dr. William Kelley solocits medical patients is supported by the evidence presented by Albert Crites and John Sortore, as well as by the publication itself. It was stated by both Albert Crites (Statement of Facts, p. 74, 75, 86, 92, P.Ex. #7) and John Sortore (Statement of Facts, p. 127, 128, 116) that they received a copy of "One Answer to Cancer" upon the payment of $1.00, as well as an examination and lab test for $50.00, while being treated by Dr. Kelley. The record fully supports the findings that Petitioners have utilized the booklet "One Answer to Cancer" as an advertising scheme, with which to secure individuals as patients, to enable Petitioners to diagnose, treat, or offer to treat a disease or disorder, physical deformity or injury, by a system or method described within said

book, attempting to effect cures thereof, and for which such patients were charged directly or indirectly.

The continued distribution of the book, directly or indirectly, by the Petitioners, would constitute a grave and immediate threat of irreparable harm: a clear and present danger of physical or mental injury or harm to the general public. (Petitioners Appendix C, Statement of Facts, p. 20, 160, 167, 176). Such a threat would continue to exist although Petitioners individually may be enjoined from the practice of medicine. (Petitioners Appendix A, page 11.) The publication is being used as an illegal tool to aid and abet the unlawful practice of medicine when actual doctor-patient relationships are being formed. Therefore, the case of *New York County Lawyers' Assn. v. Dacey*, 287 N.Y.S.2d 422, 234 N.E.2d 459 (1967), adopting the dissenting opinion in 283 N.Y.S.2d 984 (1967), cited by Petitioner is not in point. However, the case of *Grievance Committee of Bar of Fairfield County v. Dacey*, 154 Conn. 129, 222 A.2d 339 (1966), is in point, in that an attorney-client relationship was present and the Connecticut Court enjoined the further sale and publication of legal forms and the appeal was dismissed by the U.S. Supreme Court for want of a substantial federal question. 386 U.S. 683 (1967.)

Therefore, Respondent would submit that the state trial court and the Fort Worth Court of Civil Appeals of Texas did nothing but enter and approve of a judgment that was necessary for the reasonable protection of the public and was therefore proper and not in violation of any of Petitioner's constitutional rights of free speech under the Texas Constitution or the United States Constitution. Therefore, the Court was justified

in extending the injunction to the further distribution, publication and sale of the booklet "One Answer to Cancer."

The Petitioner further argues that the booklet, "One Answer to Cancer" does not present any "clear and present danger to society and that no evidence was introduced at the trial court which would support a finding of any danger much less a "clear and present danger." That even if the publication constitutes the practice of medicine, the guarantee of free speech and freedom of the press set forth in the Texas Constitution and the United States Constitution overrides the interests of the State to suppress or prohibit this publication.

Respondent submits that the testimony of Dr. Jones (Statement of Facts, p. 176, and Petitioner's Appendix C) as well as Dr. Kelley's own testimony (Statement of Facts, p. 20) is more than sufficient evidence that continued distribution of the booklet, directly or indirectly by the Petitioners, would constitute a grave, immediate threat or irreparable harm to the general public.

Petitioner's argument, that even if the publication constitutes the practice of medicine, free speech overrides the State's interest in protecting the general public, is contrary to the Texas Constitution as well as the Texas law, and has no support under the First or the Fourteenth Amendments to the Constitution of the United States.

It is the practice of medicine by an unlicensed person which creates an immediate danger to the public, which justifies the Court of the State of Texas as a matter

of law and equity to enjoin such unauthorized activities, so as to reasonably protect the public from quacks.

By authority of Article 16, Section 31, of the Texas Constitution, as well as the general police power, the Legislature has by law defined the practice of medicine and has presented rules and regulations governing the practice thereof. It is the right and duty of the State to regulate it and control it so that the public safety and welfare will be served and promoted. The enjoining of criminal conduct which the Legislature has a right to control is a permissible constitutional and legal remedy approved by said Medical Practice Act.

CONCLUSION AND PRAYER

In light of the foregoing circumstances and for the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant Attorney General
ALFRED WALKER
Executive Assistant
ROBERT C. FLOWERS
Assistant Attorney General

GUY C. FISHER
Assistant Attorney General
Attorneys for Respondent
Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General of Texas, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, certify that a copy of the foregoing Respondent's Brief and Opposition has been served on Petitioner by placing same in the United States Mail, postage prepaid to Petitioner's Attorney, Harry W. Margolis, Margolis & Staffin, 1226 Commerce Street, Dallas, Texas 75202, on this the _____ day of March, 1972.

ROBERT C. FLOWERS
Assistant Attorney General